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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CARROLL SAMARA, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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PETITIONER'S REPLY BRIEF

NATHAN LEWIN
(Counsel of Record)
MARTIN D. MINSKER
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400

Attorneys for Petitioner

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INTRODUCTION

The government's Memorandum in Opposition demonstrates that this case squarely raises, on undisputed facts, a clear-cut legal issue of considerable importance to the administration of the tax laws and of the criminal-justice system.

In our Petition we contended that the fundamental policies of repose supporting criminal statutes of limitations — as repeatedly recognized by this Court (Pet. 6-7) — require a functional common-sense approach to the question whether an amended tax return constitutes a new criminal act empowering the government to file criminal charges even after the statute of limitations has expired on the original tax return. Pet. 9-12. The government clearly admits that in this case the petitioner's return was filed for a purpose wholly irrelevant to the government's criminal case, and contained no new false representations.[1] Yet the government makes no attempt to reconcile its "separate offense" argument with the policies supporting a functional judicial approach to this issue, as set forth in our original petition and as illustrated in such cases as *Toussie* v. *United States*, 397 U.S. 112, 114-15 (1970), *United States* v. *DiSantillo*, 615 F.2d 128, 132-37 (3d Cir. 1980), and *United States* v. *Bridell*, Pet. App. G, pp. 27a, 34a. *See* Pet. 6, 10-11. The cited authorities are totally ignored in the Government's Memorandum.

ARGUMENT

1. The government's first response argues that an amended return may constitute "any return" under 26 U.S.C. §7206(1) and may amount to an act of evasion "in any manner" under §7201. It cites three cases which establish that an amended return may constitute a criminal offense under the quoted language of the Code. See Gov. Mem. 4-5 and n. 2. It is obvious that we agree, both with the government's assertion and with the three cited cases. Pet. 9 and n. 7. The issue posed in this case is *not*, however, whether the filing of an

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[1] The government acknowledges "[t]he fact that the amended return contained no new false statements relevant to the charges [for which petitioner was convicted] beyond those in the original return . . ." (Gov. Mem. 5) and that "[t]he only change petitioner made on this amended return was the revision of a depreciation schedule" (*id.* 2), which had nothing whatever to do with the criminal case against petitioner.

amended return may be a criminal offense. The dispositive question is whether it is consistent with the policies of the statute of limitations for such a return to be treated as an offense "separate" from an original return if it has been filed for a purpose irrelevant to the criminal charge. On that issue the government simply asserts the affirmative, in wholly conclusory fashion, without the benefit of reasoning or precedent.

2. Legitimate law enforcement and tax regulatory goals are fully served by the common-sense rule that only an amended return containing a new false representation is a separate criminal offense. This Court's policies regarding construction of statutes of limitations require that the limitations period run from the date of the original return if the amendment simply repeats — as the IRS's own form requires (Pet. 4 and n. 2) — the challenged information in the original return. In this case, the original return provided the IRS with all the data it needed to commence its audit.[2] If the IRS uncovers a falsehood or an attempt at evasion within six years of the filing of that return, it may initiate a timely prosecution. The amended return has absolutely no impact on the government's ability to investigate or prosecute. By treating the amended return as a "separate" offense, the government is permitted to institute an otherwise untimely prosecution.[3] The functional approach we urge, which the court below should have applied, serves to "balance the government's need for sufficient time to discover and investigate the crime against the defendant's right to avoid perpetual jeopardy for offenses committed

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[2] The IRS made its decision to audit petitioner's 1971 return *prior* to the amendment. *See* Pet. 4.

[3] In this case, prior to the expiration of the criminal statute of limitations on the original return, the government sought from petitioner a written waiver of the limitations period for that return. See Pet. 3, n. 1. The government chose to indict on the amended return only after the written waiver was refused and the statute had expired. The government admits "the fact that petitioner's filing of the original tax return for the 1971 year could have served as the basis for charges under Sections 7201 and 7206(1) . . ." Gov. Mem. 4.

in the distant past." *United States* v. *DiSantillo*, 615 F.2d at 135. This approach also has "the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity." *Toussie* v. *United States*, 397 U.S. at 115.

The government simply asserts, without benefit of explanation, that petitioner's contention based on the policies of repose "has no application to this case." Gov. Mem. 6. But in our Petition we set forth the record circumstances which demonstrate the very real prejudice suffered by petitioner because of the government's delay in commencing this prosecution. Pet. 7.

3. The government challenges our reliance on parallel decisions of this Court in civil tax cases respecting the effect of amended tax returns and other auxiliary reports on civil statutes of limitations. Pet. 8-9. The government contends that this argument is "particulary inappropriate" because the Code (26 U.S.C. 6501(c)) "expressly provides that there is *no* limitation upon the assessment of tax where a false return has been filed with the intent to evade tax or where there has been a willful attempt to defeat or evade tax." Gov. Mem. 6, n. 3 (emphasis in original).

But the Code expressly provides for strict limitations periods on *criminal* prosecutions, which this Court has repeatedly held must be carefully administered and not subject to artificial enlargement. Pet. 6-7. *See also United States* v. *Habig*, 390 U.S. 222, 227 (1968), wherein this Court, construing the criminal tax limitations provision, expressly "reiterate[d] the principle that criminal limitations statutes are 'to be liberally interpreted in favor of repose'. . . ." 390 U.S. 227, *quoting from United States* v. *Scharton*, 285 U.S. 518, 522 (1932).

It is sensible legislative policy to require strict adherence by the government to *criminal* limitations periods while authorizing unlimited *civil* fraud claims to protect the Treasury. *Cf.*, *Askins* v. *United States*, 251 F.2d 909, 912

(D.C. Cir. 1958) ("In criminal proceedings no doubt Congress also had in mind in enacting statutes of limitations for offenses not capital that punishment is but one means by which a wound to society caused by a breach of its laws may be healed, or a debt paid . . .").

Moreover, even with respect to the seemingly unambiguous language of Section 6501(c), a common-sense approach is appropriate. Thus, in *Dowell* v. *Commissioner*, 614 F.2d 1263 (10th Cir. 1980), the government contended that the "at any time" language of Section 6501(c) should be construed to allow the government to make an assessment after the statute of limitations has expired on a non-fraudulent amended tax return which had been filed to correct a fraudulent original return. The court rejected the government's question-begging approach (which was similar to its approach in this case, see pp. 2-3, *supra*). It instead analyzed the role of a tax return in the regulatory scheme, as explained in this Court's decision in *Zellerbach Paper Co.* v. *Helvering*, 293 U.S. 172 (1934). *See Dowell* v. *Commissioner*, 614 F.2d at 1265-67. As a result, the government's assessment was held time-barred (*id.*), notwithstanding seemingly unequivocal statutory language to the contrary.[4]

4. The government also cites the "concurrent sentence" doctrine in a footnote. Gov. Mem. 3, n. 1. But petitioner con

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[4] The government's attempt to distinguish the particular civil cases cited in our petition misses the point of these cases. *See* Gov. Mem. 6, n. 3. These cases apply the civil limitations periods to a particular document purporting to be a "return" or refund claim in accordance with the function of that document in the administrative regulatory scheme. See *Zellerbach Paper Co.* v. *Helvering*, 293 U.S. 172, 177-79 (1934); *United States* v. *Memphis Cotton Oil Co.*, 288 U.S. 62, 69-71 (1933); *Florsheim Bros. Co.* v. *United States*, 280 U.S. 453, 461-62 (1930). In the criminal context, a fraudulent original return triggers the IRS power to audit and investigate. The filing of an amended return for an unrelated purpose, containing no new falsehood, has no functional impact at all on this administrative investigative process. Consequently, it should not restart the limitations period.

tended below (and asserted in the Petition p. 7, n. 6) that his trial on Counts III and IV of the indictment was prejudiced by the substantial amount of evidence the government introduced on Counts I and II. Since the court of appeals expressly declined to rely on the "concurrent sentence" doctrine, rejecting instead petitioner's claim on its merits, petitioner's contention was not reached below. In these circumstances, the "concurrent sentence" doctrine may not be invoked to bar review. *See Benton* v. *Maryland*, 395 U.S. 784, 797-98 (1968). We note that in *United States* v. *Tager*, 479 F.2d 120, 124 (10th Cir. 1973) — relied on by the government on this issue (Gov. Mem. 3, n. 1) — the court observed that "[t]here is no indication that the alleged errors with respect to Count III in any way affected the conviction on Count II."

CONCLUSION

For the foregoing reasons, as well as those stated in our Petition, the writ of certiorari should be granted.

Respectfully submitted,

NATHAN LEWIN
(Counsel of Record)
MARTIN D. MINSKER
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W., Suite 500
Washington, D.C. 20037
(202) 293-6400

Attorneys for Petitioner

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